THE SOUTHWESTERN WATER CONSERVATION DISTRICT
Developing and Conserving the Waters of the
SAN JUAN AND DOLORES RIVERS AND THEIR TRIBUTARIES
IN SOUTHWESTERN COLORADO
West Building – 841 East Second Avenue
DURANGO, COLORADO 81301
(970) 247-1302

June 11, 2014

Mr. Tom Vilsack, Secretary
United States Department of Agriculture
1400 Independence Ave SW
Washington, D.C. 20250

Re: Request for Discretionary Review of the Appeal Decision of the Chief of the Forest Service on the San Juan National Forest Plan Revision.

Dear Mr. Secretary:

Pursuant to Section 17 of the Optional Appeal Procedures Available During the Planning Rule Transition Period ("Transition Appeal Procedures") as formerly codified at 36 CFR Part 217, the Southwestern Water Conservation District ("SWCD") requests that your office exercise its discretion to review the decision of the Chief of the Forest Service upholding the San Juan National Forest Plan. Specifically, the District requests that the Secretary overrule the Chief on his determination that the "minimum flow rate" standard (i.e. bypass flow) and minimum pool guideline "conforms to all relevant law, regulation, policies and agency direction." Appeal Decision at p. 28.

The SWCD was created by Colorado statute in 1941 to promote the conservation, use, and development of the waters of the San Juan and Dolores River basins in Southwestern Colorado. Substantially all of the San Juan National Forest is located within the District. New and existing water-related undertakings within the District, whether for agricultural, domestic, renewable power, ecological purposes; or to maintain, refurbish, or optimize existing water facilities will almost certainly require access to national forest lands. For example, 88% of San Juan County's land base is held in federal ownership and will be managed according to the Plan. Therefore, continued access to and across lands in the planning area for water-related activities is essential to the economic well-being of southwestern Colorado. The ability of the SWCD to carry out its statutory charge is inextricably tied to the water resource standards established in the Plan.

The operative discretionary review regulations provide:

> In electing to exercise discretion, a reviewing officer should consider, but is not limited to, such factors as ***controversy surrounding the decision***, the ***potential for litigation, whether the decision is precedential in nature, or whether the decision modifies existing or establishes new policy***.

Transition Appeal Procedures, §17(a) (emphasis added). As further outlined below, the revisions to the San Juan National Forest Plan signal the establishment of new Forest Service policy that threatens to undermine the cordial intergovernmental relationship between the federal agency and those Colorado governments charged with the conservation of State water resources and reignite one of the most contentious disputes Colorado has seen with the federal agencies.

Beginning in the early 1990's National Forest managers began an effort to impose bypass flows in Colorado when existing facilities sought renewal of land use authorizations for water diversion and storage facilities. In response to the strong objections of Colorado water rights owners, Congress established a federal water rights task force as part of the 1996 Farm Bill to evaluate the policy and legality of such bypass flow requirements. *See*, § 389(d)(3) of P.L. 104-127. The federal task force concluded, *inter alia*:

> (1) Congress has not delegated to the Forest Service the authority necessary to allow it to require that water users relinquish a part of their existing water supply or transfer their water rights to the United States as a condition of the grant or renewal of federal permits; . . . and
>
> (3) The Forest Service must attain the secondary purposes of the National Forests by obtaining and exercising water rights in accordance with state and federal law and by working with owners of non-federal water rights to achieve National Forest purposes without interfering with the diversion, storage, and use of water for non-federal purposes. The use of these approaches will avoid the circumstances that have motivated the Forest Service to act in a manner which exceeds its legal authority.

In 2003, the Colorado General Assembly, echoing the Water Rights Task Force, on a bi-partisan basis passed a joint resolution calling upon the Forest Service to "discontinue its practice of imposing bypass flow conditions on existing water infrastructure on National Forest lands." HJR 03-1046. The General Assembly further requested that, "the Forest Service seek any desired protection for instream flows through the Colorado Water Conservation Board in conformance with Colorado law for any instream flow that it believes necessary to fulfill the purposes of the forest." *Id.*

In light of the controversy surrounding the bypass flows issue, the office of the Secretary of Agriculture undertook discretionary review of the Arapahoe-Roosevelt Forest Plan removing the objectionable bypass flow prescriptions and The Forest Service also entered into an MOU with the Colorado Department of Natural Resources to work collaboratively to address Forest Service instream flow needs. Consistently, the then Undersecretary of Agriculture for Natural Resources and Environment wrote to Colorado Senator Wayne Allard confirming that, with the MOU between the Forest Service and Colorado, "the Forest Service has agreed to work cooperatively with Colorado on instream flow issues rather than take independent regulatory action affecting the exercise of water rights." Stating further, "[the MOU], the states existing instream flow program,... in combination with voluntary flow agreements...are adequate to protect and enhance instream values in Colorado's National Forests without the need for additional bypass flow requirements on water facility reauthorizations unless such requirements are necessary to satisfy the Endangered Species Act."

In 2007 the Forest Service amended its Manual to harmonize agency practice with the special relationship it had worked to develop with Colorado. The Manual directs that "[i]n those states that recognize instream flows, but require that related water rights be held in the name of the state (or some state agency), work with the appropriate agency to obtain and protect the needed water flows." FSM 2541.31.

This framework has served Colorado well for a decade and avoided the disruptive, time consuming and uncertain litigation that would have otherwise ensued. Moreover, it has resulted in over 100 instream flow water rights being appropriated by the Colorado Water Conservation Board at the request of the federal land management agencies which provide permanently protectable environmental benefits within Colorado's prior appropriation system.

This spirit of cooperative engagement has permeated water resource challenges in Colorado, generally, and has become the defining characteristic of how Colorado addresses complex demands on a limited water supply. For example, the development of a community based approach to addressing native fish challenges in the Dolores River brought together diverse stakeholders to advance a common management plan for the River. However, as described in the request for discretionary review filed by the Dolores Water Conservancy District and which the SWCD joins, the San Juan National Forest Plan Revision attempts to undermine cooperative solutions and instead has fomented discord among stakeholders.

Despite this longstanding success of Colorado's approach to facilitating federal desires for water to serve National Forest System needs, the San Juan Forest Plan upheld by the Chief makes an abrupt change in Forest Service policy that warrants review by your office with a full understanding of the delicate and successful détente that the State and Federal entities have developed over the decades.
Accordingly, the District respectfully requests that you exercise your authority to conduct a discretionary review of this abrupt policy change assessing its wisdom in light of the high likelihood that it will precipitate the decade of litigation which the federal agencies and Colorado water users have heretofore, creatively and collaboratively avoided while securing concrete "on the ground" benefits to national forest system water resources.

Sincerely,

John Porter

John Porter, President
Southwestern Water Conservation District

Cc: Senator Michael Bennett, Senator Mark Udall, Rep. Scott Tipton, Governor John Hickenlooper

COLORADO
Department of Natural Resources

Executive Director's Office
1313 Sherman Street, Room 718
Denver, CO 80203

June 16, 2014

Mr. Tom Vilsack, Secretary
United States Department of Agriculture
1400 Independence Ave SW
Washington, D.C. 2050

RE: Request for Discretionary Review of the Appeal Decision for the San Juan National Forest Plan Revision

Dear Mr. Secretary,

The Colorado Department of Natural Resources (DNR) requests that you exercise your option to review the appeal decision on the San Juan National Forest Plan Revision that was issued May 30, 2014. DNR submitted an appeal of the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) for the San Juan National Forest Land and Resource Management Plan pursuant to 36 C.F.R. 219.35, Appendix A. on December 19, 2013. The Chief of the Forest Service's appeal decision upholds the FEIS and ROD.

According to the U.S. Forest Service Document *Optional Appeal Procedures Available During the Planning Rule Transition Period*, the reviewing officer is advised to consider the following factors in electing to exercise discretionary review: 1) controversy surrounding the decision, 2) potential for litigation, 3) whether the decision is precedential in nature, or 4) whether the decision modifies existing or establishes new policy. DNR believes all of these criteria apply to this appeal decision. Indeed,the issues identified in DNR's appeal directly relate to the third and fourth factors for discretionary review consideration.

Suitability Determinations under Wild and Scenic Rivers Act are precedential:
The policies established by the decision set a precedent for disregarding collaborative national forest management efforts. Sections 3.23 of the FEIS and 3.9 of the LRMP document determinations of suitability under the Wild and Scenic River Act (WSRA) that overlook extensive collaborative stakeholder efforts, including the River Protection Workgroup, the Dolores River Dialogue and the Lower Dolores Plan Working Group. These groups were created to inform the suitability analysis and/or develop alternatives to WSRA suitability determinations. CWCB's work with these groups was funded by the Colorado General Assembly through statute to inform the suitability analysis and/or develop alternatives to WSRA suitability determinations. Moreover, the CWCB Board has adopted terms and conditions associated with the use of the appropriated funds stating that they will support cooperative and collaborative processes designed to protect outstandingly remarkable values associated with rivers in Colorado, "while protecting Colorado's ability to fully use its compact and decree entitlements." Pursuant to these laws and policies, the CWCB has worked with these groups to make substantial and demonstrable progress towards locally driven consensus solutions for resource protection.

Minimum stream flows and reservoir elevation standards create new policy:
The decision conflicts with established national and local policy, and existing agreements between the state and the U.S. Forest Service. Sections 2.5.18(a)-(d) and 2.5.22-23 of the Final LRMP identify standards for minimum stream flow and minimum reservoir levels that appear to be inconsistent with and contradictory to fundamental tenets of state water law and the Memorandum of Understanding between the USFS and DNR regarding management of water resources on USFS managed land in Colorado ("USFS MOU"). *See*, 09-MU-11020000-058.

There has been a longstanding policy of the U.S. Congress to respect and defer to state water allocation systems. Indeed, the U.S. Supreme Court recently noted that states, as sovereigns, have the right to control use of water within state boundaries. *Tarrant Reg'l Water Dist. v. Hermann*, 133 S.Ct. 2120 (2013). The State of Colorado has used its authority to control the use of water within the State through the prior appropriation system. The Final LRMP includes non-discretionary "standards" for "minimum flow rates" to support habitat in streams where native or desired non-native fish species occur, "or should occur." The LRMP's establishment of non-discretionary standards may conflict with Colorado's system of prior appropriation, as well as the State's laws governing the establishment of minimum instream flows. Under Colorado law, the Colorado Water Conservation Board (CWCB) maintains the exclusive authority to protect aquatic habitat through instream flow water rights. The USFS and DNR both acknowledge in the USFS MOU that the "CWCB is responsible for water policy and planning and the administration of the State's Instream Flow and Natural Lake Level Program, and has the exclusive authority to hold instream flow water rights under Colorado law." This authority includes the ability to establish standards for minimum stream flows and minimum natural lake levels.

For the foregoing reasons, DNR's appeal recommended that the USFS remove the LRMP provisions that establish standards for minimum stream flow and minimum reservoir levels identified in LRMP Sections 2.5.18(a)-(d) and 2.5.22-23, deleting the words "or should occur" from LRMP Section 2.5.18, and working with the CWCB to address any of USFS's minimum stream flow needs. Colorado also recommended that USFS change the flow requirements from mandatory "standards" to "guidelines," as they were contained in the Draft LRMP, which would make this portion of the LRMP consistent with state law and policy. Alternately, DNR recommended that new language be inserted into the LRMP clearly indicating that USFS will meet minimum stream flows through cooperative and collaborative methods such as the State's Instream Flow and Natural Lake Level Program.

Thank you for your consideration of the issues raised in this request for discretionary review and for the opportunity to participate in the land management planning process. We look forward to additional opportunities to work with the USDA and the USFS to find solutions to these issues, and any others that arise in the future.

Sincerely,

M.K.

Mike King, Executive Director
Colorado Department of Natural Resources

P 303.866.3311 F 303.866.2115 www.colorado.gov/dnr
John W. Hickenlooper, Governor | Mike King, Executive Director

Ute Mountain Ute Tribe

Office of the Chairman

Mr. Manuel Heart
P.O. Box JJ
Towaoc, CO 81334

June 26, 2014

Tom Vilsack, Secretary
United States Department of Agriculture
1400 Independence Ave SW
Washington DC 20250

Re: Request for Discretionary Review of and Government-to-Government Consultation Regarding the Appeal Decision of the Chief of the Forest Service on the San Juan National Forest Plan Revision.

Dear Mr. Secretary:

On behalf of the Ute Mountain Ute Tribe ("UMUT"), I am writing to request that you: (1) exercise your option to review the decision of the Chief of the Forest Service upholding the San Juan National Forest Plan ("LRMP") (as requested by the Dolores Water Conservancy District, the Southwestern Water Conservation District, and the Colorado Department of Natural Resources); and (2) immediately consult with the UMUT on a government-to-government basis regarding how the United States Forest Service's ("USFS") determinations regarding "minimum flow rate" standards (bypass flows), minimum pool guidelines, and identifying bluehead sucker and flannelmouth sucker as "outstandingly remarkable values" pursuant to the Wild and Scenic Rivers Act will impact the UMUT's federal reserved water rights allocations in the Dolores Project.

As you may know, the UMUT holds significant water rights allocations in the Dolores Project pursuant to the Colorado Ute Indian Water Rights Final Settlement Agreement of December 10, 1986, as authorized by Congress in the Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, and as amended by the Colorado Ute Settlement Act Amendments of 2000, Pub. L. No. 106-554 and Pub. L. No, 110-161 (2007). The UMUT allocations in the Dolores Project are the result of a negotiated settlement where the UMUT accepted federal storage project water and delivery infrastructure in exchange for the loss or subordination of significant senior priority direct flow federal reserved water rights in several tributaries to the San Juan River. The UMUT's Dolores Project allocation is currently the only water supply providing drinking water, industrial water, and irrigation water to the Tribal community in Towaoc, to the UMUT and federal government buildings located in Towaoc, and to UMU Tribal enterprises (including the UMU Farm & Ranch Enterprise).

The other governmental and water district entities requesting your discretionary review have expressed their concern that the abrupt inclusion of water supply constraints in the final LRMP came as a surprise to entities that participated in the Draft Plan and the DEIS process. The UMUT was also surprised that the USFS included new constraints in the final LRMP that potentially threaten the UMUT water allocations in the Dolores Project. The USFS did not consult with the UMUT about the possible impact that the minimum flow rate standards, the minimum pool guidelines, and the new ORV designations will have on the delivery of Dolores Project allocations to the UMUT. There is no evidence that the USFS analyzed the impact of these final LRMP provisions on the UMUT water rights or on other Indian Trust Assets or that the USFS has otherwise properly exercised its trust responsibility to the UMUT.

The UMUT is concerned that, if the LRMP provisions on the minimum flow rate standards, the minimum pool guidelines, or the ORV designations fundamentally alter the Dolores Water Conservancy District's ability to deliver the UMUT's Dolores Project allocations, the implementation of the LRMP could jeopardize the entire Colorado Ute Indian Water Rights Final Settlement Agreement. Any disruption in the delivery of critical federal reserved water rights to a historically underserved Tribal community and reservation could reverse the significant progress made under the Colorado Ute Indian Water Rights Final Settlement Agreement to balance the needs of Tribal and non-Tribal water users in many over-allocated water basins in southwestern Colorado. Accordingly, I am now requesting that you exercise your discretion to review the final LRMP and that you immediately consult with the UMUT regarding the impacts of the final LRMP on the UMUT's Dolores Project allocations.

Please contact Michela Alire, Tribal Chairman's Secretary, at (970) 564-5600 or malire@utemountain.org to schedule the requested government-to-government consultation. Please also contact Celene Hawkins, Associate General Counsel, at (970) 564-5642 or chawkins@utemountain.org if you have any questions about this request.

Sincerely,

Manuel Heart

Manuel Heart
Chairman
Ute Mountain Ute Tribe

Cc: Senator Michael Bennett
Senator Mark Udall
Representative Scott Tipton
Bruce Smart, Board President, Dolores Water Conservation District
John Porter, President, Southwestern Water Conservation District
Michael King, Executive Director, Colorado Department of Natural Resources